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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 631

BERTHA MERRICK,
Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

JEROME J. DUFF,
Suite 1155—818 Olive Street,
St. Louis, Missouri (63101),
314—MAin 1-3833,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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BERTHA MERRICK,
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vs.

ALLSTATE INSURANCE COMPANY,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Bertha Merrick, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on July 27, 1965, and affirmed by Order denying Petitioner's petition for rehearing on August 17, 1965.

OPINIONS BELOW.

The opinion of the District Court is reported in 236 Federal Supplement 451. It is also printed in the Appendix (Appendix A, pages 11 to 13).

The opinion of the Eighth Circuit Court of Appeals has not yet been reported. A copy is appended to this petition as Appendix B (Infra, pages 14-20).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 27, 1965. The petitioner was denied rehearing on August 17, 1965. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646 (1), 62 Stat. 928 (1), 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. May summary judgment against a plaintiff be affirmed on appeal when the affirmation is based upon a ruling of law which substantially differs from the ruling of law made by the District Court below and the ruling of law made by the Appeals Court would allow the plaintiff to proceed to trial on the merits of the plaintiff's complaint?

2. May summary judgment against a plaintiff be affirmed on appeal on the basis that the "record affords • • • no information" regarding a relevant fact issue upon which plaintiff has never had the right to offer evidence in a trial of her cause?

STATEMENT OF THE CASE.

This is an action by an insured against an insurance company to recover all future sums payable under a weekly disability insurance policy for the period of the life expectancy of the insured. The Complaint alleges total breach, total repudiation and abandonment of the insuring contract by the insurance company.

The petitioner is a resident of Missouri. The respondent insurance company is an Illinois corporation, licensed to do business in Missouri. The petitioner instituted her action in the Missouri Circuit Court. The respondent in-

surance company removed the action to the federal court (R. p. 1). Federal jurisdiction was invoked because of diversity of citizenship.

The petitioner was insured by the respondent under a disability policy calling for the payment of $50.00 per week so long as the petitioner was continuously and totally disabled as a result of injury arising out of an automobile accident. On November 12, 1959, while the policy was in effect, the petitioner sustained disabling injuries in an automobile accident. The respondent insurance company has paid the petitioner $50.00 per week from November 13, 1959, to the date of the filing of this petition for a Writ of Certiorari. HOWEVER, these payments have been made only because of the following efforts by this petitioner:

(the following recitation is found in the petitioner's Complaint, R. 243; the District Court Opinion, Appendix A, page 11, and the Court of Appeals Opinion, Appendix B, page 14).

1. The respondent refused to pay benefits in 1960.

A. The petitioner instituted a suit against the respondent for payment of past due benefits in the Circuit Court of the City of St. Louis in 1961. The respondent then paid all accrued benefits and the action was dismissed by stipulation.

2. The respondent again refused to pay benefits in 1962.

A. The petitioner instituted a second suit against the respondent in the United States District Court for the Eastern District of Missouri in 1963. The action was tried to a conclusion resulting in a judgment in favor of petitioner for benefits to the date of completion of the trial. The respondent paid the judgment.

3. The respondent again refused to pay benefits in 1964.

A. The petitioner instituted a third suit against the respondent in the Magistrate Court of the City of St. Louis in 1964. By a stipulation concluding that action the respondent paid the petitioner the past due disability benefits plus statutory penalties.

4. The present action for total breach, repudiation, etc., was instituted by the petitioner in the United States District Court for the Eastern District of Missouri, in 1964.

A. The respondent has regularly paid the disability benefits from the time of the dismissal of the third suit (No. 3 A, supra) to date.

The insuring contract was made in Missouri and Missouri law governs.

The District Court granted summary judgment to the respondent (Appendix A, page 13). The Memorandum Opinion of the District Court sets out the general rule of law in Missouri that:

(a) "when a contract remains executory on one side only, such as where money is to be paid regularly to the other contracting party, then in the event of default in performance, suit may be brought to collect only the amount due at the time of the suit" (Supporting citations omitted) (Appendix A, page 12).

(b) "since under the Missouri decisions the Plaintiff can only recover from the Defendant payments in default, the Plaintiff cannot recover in this action" (Appendix A, page 13).

The District Court opinion did not find any recognizable exceptions to the Missouri general rule of contract law applicable to insuring agreements of this type, nor did the District Court opinion question the nature or the extent of the petitioner's disability or the reasons why the respondent repeatedly withheld payment.

The petitioner filed a timely appeal to the Eighth Circuit Court of Appeals (R. 11).

The Appeals Court affirmed the entry of summary judgment by the District Court.

The opinion of the Court of Appeals recites the general proposition found in the Missouri law as follows (Appendix B, page 17):

> "Specifically, disability contracts have been held in Missouri to be contracts to pay money at specified times and thus only unilaterally executory and not subject to the doctrine of anticipatory breach." (Supporting cases omitted.)

The Court of Appeals then states (Appendix B, page 17):

> "The insured (petitioner) apparently does not quarrel with these general propositions of Missouri law. She (petitioner) asserts, instead, 'that her total position in this litigation is predicated upon the recognized exceptions to the general rule.'"

The Court of Appeals then isolates the teachings found in the landmark cases which recognized the exceptions to the Missouri general rule and summarizes the position of the Eighth Circuit Court of Appeals on this principle of the exceptions to the Missouri rule to be (Appendix B, page 19):

> "We (the Eighth Circuit Court of Appeals) recognize that the Supreme Court in Viglas (The United States Supreme Court case of New York Life Insurance Company v. Viglas, 297 U. S. 672, 56 S. Ct. 615) and the dissenting Judge in Rascoe (the Sixth Circuit Court of Appeals case of Federal Life Insurance Company v. Rascoe, 12 F. 2d 693, 697-98), seem to have entertained a reluctance to foreclose completely the application of the doctrine of anticipatory breach

to a unilaterally executory situation. We (the Eighth Circuit Court of Appeals) also, might be inclined to be that cautious."

The Court of Appeals' opinion then seizes upon the point that the record before it affords no information as to the nature of the Plaintiff's disability or the reasons why Allstate (the respondent) has withheld payment. The Court of Appeals concludes the reasoning upon which it affirms the entry of summary judgment by finding the Missouri general rule too clearly established to presume that an exception exists which has "application to the bare record, including the Plaintiff's current acceptance of weekly benefits in this case" (Appendix B, page 19).

Petitioner filed a timely petition for rehearing (Appendix C, pages 21 to 26) which was summarily denied (R. 15).

REASONS FOR GRANTING THE WRIT.

1. The summary judgment rule (Rule 56 (c), Federal Rules of Civil Procedure, 28 U. S. C. A.) is violated by the decision of the Eighth Circuit Court of Appeals in this case.

(a) The District Court below erroneously granted summary judgment to the respondent by applying a general principle of Missouri contract law to a fact situation which invokes an attempted recovery under clearly recognizable exceptions to that general principle.

(b) The Court of Appeals below correctly recognized and identified the exceptions to the general rule of Missouri law relied upon by the petitioner as the theory on which petitioner seeks to submit her claim for total repudiation.

(c) The Court of Appeals below, after finding the correct legal principles upon which Plaintiff seeks her recov-

ery, then agreed that it "might be inclined" to apply the doctrine of anticipatory breach to a unilaterally executory contract situation (Appendix B, page 19).

(d) The Court of Appeals below then found that the record before it did not reflect any evidence regarding the petitioner's disability or the reasons why the respondent had repeatedly withheld payment. The Court of Appeals below then concludes that it cannot presume that an exception to the general principle of Missouri law might exist in this case because the record is bare of relevant evidence. The summary judgment entered by the District Court is thus affirmed.

2. Petitioner respectfully submits that the Court of Appeals has allowed a gross abuse of Rule 56 (c), Federal Rules of Civil Procedure, 28 United States Code Annotated, by drastically penalizing the petitioner for failing to have relevant evidence in the record which the petitioner was never allowed to get into the record. The issues regarding the nature and extent of petitioner's disability; the reasons, if any, for the nightmarish conduct of the respondent in this case and the effect, if any, of the petitioner's acceptance of weekly benefits since the date of the entry of the third judgment in her favor are all fact questions for a jury to consider in weighing the merits of petitioner's asserted claim of the total breach and repudiation of this insuring agreement which has necessitated three prior law suits.

A. The findings of the Court of Appeals below establish that petitioner has asserted a submissible cause of action against the respondent. The proper ruling of the Court of Appeals was to vacate the summary judgment entered against petitioner and order the case to trial on the merits.

3. The reasonable limitations imposed upon summary judgment procedure have been so seriously ignored, that

this Court, in the exercise of its supervisory power should forbid such encroachments on the petitioner's right to trial by jury. This Court teaches that summary judgment is validly invoked "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . (and where) no genuine issue remains for trial . . . (for) the purpose of the rule is not to cut off litigants from their right of trial by jury if they really have issues to try" (Poller v. Columbia Broadcasting System, 82 S. Ct. 486 at 488, 368 U. S. 464 at 467, quoting from Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620 at 627, 64 S. Ct. 724 at 728). This petitioner's rights are further protected by the rule reiterated in Simler v. Conner, 83 S. Ct. 609 at 610, 372 U. S. 221 at 222, that "the federal policy favoring jury trials is of historic and continuing strength." (Additional supporting authorities omitted.)

4. The enunciation of a principle by this Court is required by the circumstances of this case. The petitioner is one of millions of insured persons depending upon the good faith of a disability insurer when disabling disaster strikes. The petitioner has bowed to and adhered to the general legal principles which bind and guide her contractual relationship with the respondent through three prior successful lawsuits. The fact that recognizable exceptions to these general principles exist is found in the decisions themselves (New York Life Insurance Company v. Viglas, 297 U. S. 672, 56 S. Ct. 615; Allen v. National Life and Accident Insurance Co., 67 S. W. 2d 534, citing with approval the dissenting opinion in Federal Life Insurance Co. v. Rascoe, 12 F. 2d 693 at 697 and 698). The Court of Appeals below correctly identified the exceptions. The petitioner respectfully submits that the obvious persistent bad faith of the respondent adequately qualifies her cause of action for total repudiation to at least be

submitted to a jury for a determination and, conversely, certainly does not warrant her being summarily foreclosed by a misapplication of a procedural rule by the federal courts below. To allow this decision to stand as the law in any state or federal circuit which follows the Missouri general principle in cases of this nature will provoke ever greater chicanery and oppression by unscrupulous disability insurance carriers. The decisions of the Courts below in this case are destined to fester constant litigation. The decision of the Court of Appeals below allows this petitioner to take her Complaint to a jury for appraisal, she asks this Court to affirm that right.

CONCLUSION.

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

JEROME J. DUFF,
818 Olive Street,
St. Louis, Missouri,
Counsel for Petitioner.

September ..., 1965.

Affidavit of Service.

State of Missouri, }
City of St. Louis. } ss.

I, Jerome J. Duff, of counsel for the Petitioner herein, and attorney of record for the Petitioner in the Courts below, depose that on the ..... day of September, 1965, I served four copies of the foregoing Petition for Writ of Certiorari on the Respondent, as required by Rule 33,

Paragraph 1, by personally delivering said copies hereof to F. X. Cleary, Attorney of Record for the Respondent, in care of the law offices of Moser, Marsalek, Carpenter, Cleary & Jaeckel, 330 Pierce Building, St. Louis 2, Missouri.

.....

Jerome J. Duff.

APPENDIX A.

Memorandum Opinion.

(Filed in U. S. District Court on Nov. 5, 1964.)

This case is before the court on defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

From the pleadings, two affidavits and exhibits, it appears that the plaintiff filed suit against this defendant in the Circuit Court of St. Louis in March, 1964, being Cause No. 62313, which cause was duly removed to this court. Plaintiff's claim is based on a policy of insurance with the defendant and under which plaintiff has been receiving disability payments of $50.00 per week. Plaintiff has previously brought three separate suits against the defendant in order to obtain her payments. At the time this suit was filed there was pending in the Magistrate Court of the City of St. Louis, Cause No. 52691, the third suit referred to.

Plaintiff contends in this action that defendant's refusal to pay constitutes a total and complete repudiation of the contract of insurance and prays for the payment of all future installments due based upon the period of plaintiff's life expectancy. This court on September 16, 1964, overruled plaintiff's motion for an order of partial summary judgment, and the defendant since that time has filed the motion which is before the court because of new development between the parties.

The affidavit with respect to the motion for summary judgment and the exhibit attached thereto shows that on July 31, 1964, a stipulation for dismissal was filed in Cause No. 52691 in the Magistrate Court of the City of St. Louis on the basis of payment to plaintiff by the defendant for

thirty-seven (37) weeks of disability, plus interest, court costs and penalties for attorney's fees and vexatious delay.

The motion for summary judgment, which is sworn to, further sets out that regular disability payments have been made to the plaintiff since July 31, 1964. The defendant contends in its motion that as a result of these events the present action is moot and that by plaintiff's acceptance she has treated the contract of insurance as being in existence, as well as removing the issue of vexatious delay and attorney's fee.

The Missouri courts have repeatedly held that when a contract remains executory on one side only, such as where money is to be paid regularly to the other contracting party, then in the event of default in performance, suit may be brought to collect only the amount due at the time of the suit. **Bonslett v. New York Life Ins. Co.**, 190 S. W. 870; **Allen v. National Life and Accident Co.**, 67 S. W. 2d 534; **Hawkinson v. Johnston**, 122 F. 2d 724.

Thus, the complaining party may sue immediately for each payment as it becomes due, or elect to wait until such time as complete performance is due and then collect the total amount owed. The **Allen** case, supra, is very similar to the case before the court and recovery was only permitted for payments due when the suit was filed, and recovery was denied for benefits not due at the time the suit was filed, but based on life expectancy.

The Supreme Court in **New York Life Insurance Company v. Viglas**, 297 U. S. 672, 678, said:

> "• • • for breach short of repudiation or an intentional abandonment equivalent thereto, the damages under such a policy as this do not exceed the benefits in default at the commencement of the suit."

The court in so holding cites a number of cases from various states, including the Allen case, supra, from Missouri.

As set out, supra, the plaintiff is not entitled at this time to recover for any past due disability payments, and since under the Missouri decisions the plaintiff can only recover from the defendant payments in default, the plaintiff cannot recover in this action.

Accordingly, defendant's motion for summary judgment will be sustained and the clerk will prepare and enter the proper order to that effect.

Roy W. Harper,
U. S. District Judge.

APPENDIX B.

(Judgment entered on July 27, 1965.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,928.

Bertha Merrick,
Appellant,

v.

Allstate Insurance Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 27, 1965.]

Before Van Oosterhout, Blackmun, and Mehaffy, Circuit Judges.

Blackmun, Circuit Judge.

Allstate Insurance Company insured Bertha Merrick under a disability policy calling for the payment of $50 per week so long as she was continuously and totally disabled as a result of an injury sustained in an automobile accident. Thereafter, and while the policy was in effect, she suffered injury in such an accident. She brings this action, removed from state court, against Allstate to recover, on the grounds of alleged breach, repudiation, and abandonment of the contract, all future sums payable under the policy during her life expectancy, and, pursuant to Mo. Rev. Stat., § 375.420 (1959), additional punitive

damages and an attorney's fee for the defendant's vexatious refusal to pay. Chief Judge Harper ordered the entry of summary judgment in favor of Allstate. 236 F. Supp. 451.

The policy was a Missouri contract and Missouri law governs. The facts are not in dispute. The accident occurred on November 12, 1959. The insured actually has received disability payments under the policy from Allstate but these payments for the most part have been the result of litigation which the plaintiff has instituted. She first sued Allstate in the Circuit Court in the City of Saint Louis. When the insurer then paid all accrued benefits, that action was dismissed by stipulation. Allstate again refused to pay and the plaintiff sued a second time in the United States District Court for the Eastern District of Missouri. That case proceeded to trial and resulted in a judgment for the insured for benefits to the date of completion of the trial. Allstate paid that judgment. Then the insurer again ceased payments and for the third time the plaintiff sued. That action was in the Magistrate Court of the City of Saint Louis. It was dismissed on July 31, 1964, when Allstate made payment to the insured for a stated number of weeks of disability, interest, costs, and statutory damages.

Since July 1964 Allstate has regularly made the disability payments to the plaintiff and she has accepted them.

The present suit was begun in March 1964 after the Magistrate Court action had been instituted but before it was dismissed. The action is thus the fourth successive one which the plaintiff has brought against Allstate on the policy in question.

Judge Harper held that under Missouri law, when a contract remains executory only on one side and default

occurs, suit may be brought to collect only the amount then due. Therefore, inasmuch as there was nothing due under the contract at the time of the court's ruling on the defendant's motion for summary judgment, the court sustained that motion.

The Missouri law seems clearly settled. In **Allen v. National Life & Acc. Ins. Co.**, 228 Mo. App. 450, 67 S. W. 2d 534 (1934), the court stated the problem:

> "[T]his appeal involves the question as to whether the holder of a contract of insurance providing for periodic payments of benefits for disability is entitled to a commutation of such benefits which might become due in the future, on the ground that the insurance company has been guilty of an anticipatory breach of the contract, the determination of the future benefits being based on the life expectancy of the insured."

It then referred to the rule that where a contract is mutually executory a total repudiation by one party is a breach which gives an immediate right of action for all resulting damages, but that where one party has executed his part of the contract and it is executory only on the part of the other, "such as a contract with respect to the payment of money at specified times", then a suit may be maintained just for the instalments which are due. The court said, p. 535 of 67 S. W. 2d:

> "The question, therefore, is whether the indemnity contracted for in the policies of insurance before us comes under the heading of mutually executory contracts or whether the contracts have been executed by one party. We think that these contracts of insurance come under the latter. Plaintiff has fully performed her part of the contracts and there remains nothing to be done except for defendant to pay the installments at the times specified."

In **Leon v. Barnsdale Zinc Co.**, 309 Mo. 276, 274 S. W. 699, 703 (1925), the Supreme Court of Missouri, in speaking of anticipatory breach, said:

> "That doctrine, however, applies only to contracts which are at least in part mutually executory, where there are interdependent obligations. It cannot be invoked with respect to contracts to pay money at specified times, where one of the parties has completely executed the contract, and it is executory only on the part of the other party."

Of like import are **Bonslett v. New York Life Ins. Co.**, 190 S. W. 870, 875 (Mo. 1916); **Puckett v. National Annuity Ass'n.**, 134 Mo. App. 501, 114 S. W. 1039 (1908); **Chipley v. National Life & Acc. Ins. Co.**, 67 S. W. 2d 127, 133 (1934); **Buis v. Prudential Ins. Co. of America**, 229 Mo. App. 190, 77 S. W. 2d 127, 133 (1934); **Hawkinson v. Johnston**, 122 F. 2d 724, 729 (8 Cir. 1941), cert. denied 314 U. S. 694; **Parks v. Maryland Cas. Co.**, 59 F. 2d 736 (W. D. Mo. 1932); **Kithcart v. Metropolitan Life Ins. Co.**, 1 F. Supp. 719 (W. D. Mo. 1932). See **New York Life Ins. Co. v. Viglas**, 297 U. S. 672, 678 (1936), and **Smyth v. United States**, 302 U. S. 329, 356 (1937).

Specifically, disability contracts have been held in Missouri to be contracts to pay money at specified times and thus only unilaterally executory and not subject to the doctrine of anticipatory breach. **Allen, Puckett, Chipley, Buis,** and **Kithcart** all concerned contracts of this kind.

The insured apparently does not quarrel with these general propositions of Missouri law. She asserts, instead, "that her total position in this litigation is predicated upon the recognized exceptions to the general rule". She refers primarily to the opinion in **New York Life Ins. Co. v. Viglas**, supra, written by Mr. Justice Cardozo, and

stresses that (1) the Court there found nothing in the complaint referable to repudiation and future benefits (whereas here allegations of this kind are present and the admitted facts disclose the necessity of past successive suits); (2) there was nothing there to show that the insurer was not acting in good faith (whereas here litigation has been compelled and the insurer has paid penalties for vexatious delay); (3) when the insurer there gave notice of no further payments there had been no renunciation or abandonment of the entire contract (whereas here, in contrast, we have Allstate's continuing refusal to pay, even after the federal judgment); (4) the insurer there committed only a breach for which it was answerable in damages (whereas here the insurer has already been required to answer in damages on three separate occasions, once punitively); (5) the Court there refrained from deciding what the damages would be "if there had been complete repudiation", and thus did not, as a matter of law, foreclose a cause of action for repudiation; (6) the Court there, p. 679, refused

> ". . . to suggest an invariable rule whereby the full value of a bargain may never be recovered for any breach of contract falling short of repudiation or intentional abandonment. All depends upon the circumstances."

(whereas the present case is one where the insured should be relieved of the burden of still further suits); and (7) the Court noted, p. 682, that the complaint there "does not make a showing of a breach so wilful and material as to make acceleration of future benefits essential to the attainment of present reparation" (whereas the payment of punitive damages in settlement of the third lawsuit here is an admission of willful and material breach).

The dissenting opinion in **Federal Life Ins. Co. v. Rascoe**, 12 F. 2d 693, 697-98 (6 Cir. 1926), cert. denied 273 U. S. 722, referred to with approval by the Kansas City Court of Appeals in **Allen v. National Life & Acc. Ins. Co.**, supra, p. 536 of 67 S. W. 2d, and Restatement, Contracts, § 318, as revised in its 1948 Supplement, are also cited and are said to lend support to the proposition that the doctrine of anticipatory breach is not inapplicable to every unilaterally executory contract.

Certainly a situation where a plaintiff-insured has found it necessary four times within five years to resort to court action to establish her right to disability payments, particularly where payment of punitive damages has already once been effected, is one which tends to incite sympathy. However, a claim resting on "total disability" often presents a close and continuing question. The present record affords us no information as to the nature of the plaintiff's disability or as to the reasons why Allstate repeatedly has withheld payment. We would have to indulge in surmise as to these. The question thus comes to us almost naked and clothed with only the facts of prior litigation and of one payment of statutory damages.

We recognize that the Supreme Court in **Viglas** and the dissenting judge in **Rascoe** seem to have entertained a reluctance to foreclose completely the application of the doctrine of anticipatory breach to a unilaterally executory situation. We, also, might be inclined to be that cautious. But the Missouri law seems too clearly and firmly established for us to presume that an exception exists which has application to the bare record, including the plaintiff's current acceptance of weekly benefits, in this case. The experienced Missouri federal judge who tried the matter was not so persuaded as to the law of his state and we feel that we are not justified in reaching a con-

trary conclusion. **Homolla v. Gluck**, 248 F. 2d 731, 733-35 (8 Cir. 1957); **National Bellas Hess, Inc. v. Kalis**, 191 F. 2d 739, 741 (8 Cir. 1951), cert. denied 342 U. S. 933.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

(Filed August 10, 1965—Denied August 17, 1965.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,928.
Civil.

Bertha Merrick,
Appellant,
vs.
Allstate Insurance Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition for Rehearing.

The Appellant respectfully petitions this Honorable Court for a rehearing of the appeal in this cause, and in support of this petition represents to the Court as follows:

Appellant reserves her argued position as to each of the points of appeal. In this petition she addresses herself solely to that feature of this Court's decision wherein she believes that the Court may be convinced that the result herein is based upon an erroneous application of the law of the State of Missouri in that the District Court and this Court did not reach a permissible conclusion.

Therefore, this petition is devoted to convincing this Court that the record herein is adequate to prove the fact of the insureds "total disability" (Court's Opinion, Page Six). The admitted facts and findings thereon establish that the District Court below and this Court clearly misapplied the local law of Missouri on the doctrine of anticipatory breach by repudiation of a unilaterally executory contract. Appellant urges that her case comes within recognized exceptions to the Missouri general rule of law in this field.

Appellant respectfully requests the Court to re-consider its Opinion and ruling upon these unassailable premises:

1. Appellant continues to agree that the Law of Missouri, particularly as recited in the Kansas City Court of Appeals decision in the case of Allen v. National Life and Accident Insurance Company (67 S. W. 2d 535; Court's Opinion, Pages 3, 4 and 6) applies to this case.

2. This Court recognizes that the application of the doctrine of anticipatory breach to a unilaterally executory contract situation is NOT foreclosed (Court's Opinion, Page Six) and therefore that doctrine could apply in this case.

3. The Court finds that the record contains "no information as to the nature of the Plaintiff's disability or as to the reasons why Allstate has repeatedly withheld payment" (Court's Opinion, Page Six).

(a) The Court finds that this "bare record, including Plaintiff's current acceptance of weekly benefits", will not allow for the Court "to presume that an exception exists" (Court's Opinion, Page Six).

Appellant concludes from these findings that if the record satisfactorily disclosed that she was and is per-

manently and totally disabled that the Court would have, perhaps, allowed her to seek her total recovery in this case.

Appellant respectfully submits that the record does disclose the fact of her total disability sufficiently for the Court to allow her to proceed to trial herein. She can then fully develop her proof of her claim that the Missouri doctrine of breach by repudiation must apply to the existing nightmarish contractual relationship between these parties. The following propositions are urged in support of this position:

1. The Court finds that the present contractual relationship of these parties is classifiable under the general rule "**that where one party has executed his part of the contract** and it is executory only on the part of the other 'such as a contract with respect to the payment of money at specified times', then a suit may be maintained just for the installments which are due" (Court's Opinion, Page Three).

2. In quoting the general rule of the Missouri Allen case as it applies to the present contractual relationship of these parties the Court sets out the following excerpt (among others)—"**Plaintiff** (meaning the insured) **has fully performed her part of the contract** and there remains nothing to be done except for the Defendant (Insurance Company) to pay the installments at the times specified" (Court's Opinion, Pages Three and Four).

3. The Court further states (Court's Opinion, Page Four) ". . . disability contracts have been held in Missouri to be contracts to pay money at specified times **and thus only unilaterally executory** and not subject to the doctrine of anticipatory breach" (Court's Opinion, Page Four).

The Court has found that the Missouri law recognizes certain exceptions to the Missouri general rule forbidding application of the doctrine of anticipatory breach to unilaterally executory contracts (Court's Opinion, Page Six). If the general rule, and its recognized exceptions, are applicable to this case hasn't this Court found as a fact that the appellant "has executed her part of the contract", that she has "fully performed her part of the contract", that the contract is "thus only unilaterally executory"? If the appellant has "executed" and "performed" her part of the contract doesn't this Court find without having "to indulge in surmise" (Court's Opinion, Page 6) that to date the appellant-insured has satisfactorily met all policy required disability standards? The admitted facts herein show that she met these disability standards **successfully** in litigation four times in five years, the last time while this case, claiming total repudiation, was pending. Since the time of this last judgment in favor of the insured, Allstate has continued to pay her disability benefits and thereby fully admits that the insured continues to be "totally disabled".

In summary of Appellant's primary point in this Motion for Rehearing the Appellant respectfully submits that upon this case being decided by the Missouri law controlling unilaterally executory contracts this Court and the District Court below have automatically found that the insured has **fully performed** her end of this agreement (i. e.—continuing acceptable proof of her total disability for all relevant purposes herein). It is the monstrous misconduct of the insurer herein which classifies this case within a recognized exception to the Missouri general rule and allows the insured to invoke the relief available to her plight provided by the doctrine of anticipatory breach.

Appellant is compelled to urge this Court to consider the ruling of the District Court and its affirmation by this

Court in the floodlight of the teaching of this Court by Judge Johnsen 24 years ago upon the general doctrine of anticipatory breach by repudiation under Missouri Law, in the case of Hawkinson v. Johnston, 122 F. 2d 724, 729 (Eighth Circuit 1941, cert. den. 314 U. S. 694) (Cited in the Court's Opinion herein, page 4):

> "The real sanctity of any contract rests only in the mutual willingness of the parties to perform. Where this willingness ceases to exist any attempt to prolong or preserve the status between them will usually be unsatisfactory and mechanical. Generally speaking, it is far better in such a situation, for the individuals and for society, that the rights and obligations between them should be promptly and definitely settled, if the injured party so desires, unless there is some provision in the contract that, as a matter of mutual intention, can be said to prevent this from being done. The commercial world has long since learned the desirability of fixing its liabilities and losses as quickly as possible, and the law similarly needs to remind itself that, to be useful, it too must seek to be practical".

In conclusion, Appellant must ask this Court to indulge in the practical surmise of predicting what Allstate's conduct will be insofar as continuing to pay her disability benefits if this litigation should be allowed to end on the present harsh note. We again pray that this Court reverse the Judgment of the District Court and remand this case for trial on the issue of damages only. Or, in the alternative, Appellant prays that this appeal be re-heard by this Court or by the Court en banc. To summarily foreclose this claim as a matter of law goes far beyond any permissible conclusion under the applicable Missouri contract rules and denies Appellant her long sought and well earned final "day in Court".

For the foregoing reasons Appellant respectfully prays that this petition for rehearing be granted.

.....

JEROME J. DUFF,
Suite 1155—818 Olive Street,
St. Louis, Missouri 63101,
314—MAin 1-3833,
Attorney for Appellant.

State of Missouri }
City of St. Louis } ss.

Jerome J. Duff, being first duly sworn on oath, certifies and says:

He is the attorney for appellant in this cause; in compliance with Rule 15 (a) of this Court he further states that this petition is submitted in good faith and he believes it to be meritorious. The petition is not interposed for any vexatious reason or for delay.

.....

Jerome J. Duff.

Subscribed and sworn to before me at St. Louis, Missouri, this ... day of August, 1965.

.....

Notary Public.

My Commission Expires: .....

Copy of the Motion to Messrs. Moser, Marsalek, Carpenter, Cleary & Jaeckel, Attorneys for Appellee, 330 Pierce Building, St. Louis, Missouri (63102), this ... day of August, 1965.

.....

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 631.

BERTHA MERRICK,
Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

JOHN S. MARSALEK,
330 Pierce Building,
112 North Fourth Street,
St. Louis, Missouri 63102,
Attorney for Respondent.

Of Counsel:
MOSER, MARSALEK, CARPENTER,
CLEARY & JAECKEL.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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BERTHA MERRICK,
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Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

QUESTIONS PRESENTED.

I.

In an action on a contract of insurance providing for periodic income payments in the event of total disability, under Missouri law, is the insured entitled to recover commuted benefits based upon life expectancy on the theory the insurer has been guilty of an anticipatory breach of the contract?

II.

In such an action, where the holder has been denied recovery in the District Court and the Court of Appeals below, should this court exercise its discretionary power to review the judgment?

STATEMENT SUPPLEMENTING PETITIONER'S STATEMENT.

At the time the District Court ruled, respondent was not in default to petitioner for any disability income payments and there was nothing then due petitioner (R. 9-10). Respondent has continued to pay and petitioner has continued to accept, up to the present time, the weekly benefits provided by the disability income policy in question (Affidavit of Petitioner [R. 6]).

SUMMARY OF ARGUMENT.

(1) The decisions of the District Court and the Court of Appeals are correct and in accord with this court's decisions.

(2) Under Missouri decisions involving disability income policies, recovery can be had only for payments in default and an action for anticipatory breach does not lie.

(3) The District Court's action in sustaining respondent's motion for summary judgment and the subsequent action of the Court of Appeals in affirming that judgment were correct, since respondent was entitled to judgment as a matter of law. Furthermore, petitioner's contention was not properly preserved for this court's consideration, since the point raised here was not raised by petitioner in the Court of Appeals.

ARGUMENT.

(1-2) Under the Missouri decisions, the holder of a contract of insurance providing for periodic income payments in the event of disability is not entitled to recover for commuted benefits based upon life expectancy on the theory the insurer has been guilty of an anticipatory breach of the contract. **Allen v. National Life & Accident Ins. Co.**, 228 Mo. App. 450, 67 S. W. 2d 534; **Buis v. Prudential Ins. Co. of America**, 229 Mo. App. 190, 77 S. W. 2d 127.

The reason for the rule, as explained by the court in the **Allen** case, supra, involves an application of the rule laid down in the leading case of **Roehm v. Horst**, 20 S. Ct. 876, 178 U. S. 1, 44 L. Ed. 953, which has been followed in Missouri. The **Roehm** case, supra, held that anticipatory breach lies only in situations where the contract is mutually executory, at least in part, and there is a repudiation of the contract on the part of one covering the entire performance before the time for performance. In such situations, the breach gives an immediate right of action for the entire damage.

However, ordinarily no action lies for anticipatory breach of a contract providing for the payment of stipulated sums of money at definite periods. Where one party has completed his part of the contract and the contract is executory on the part of the other party only, such as when money is to be paid to the other contracting party at specified times, under the Missouri decisions, in the event of breach, suit may be brought only to collect the amount due at the time the suit is commenced. **Bonslett v. New York Life Ins. Co.**, Mo., 190 S. W. 870; **Chipley v. National Life and Accident Company**, Mo. App., 67 S. W. 2d 992.

Specifically, disability contracts have been held in Missouri to be contracts to pay money at specified times

and, thus, only unilaterally executory and not subject to the doctrine of anticipatory breach. **Allen v. National Life & Accident Ins. Co.**, supra; **Buis v. Prudential Ins. Co. of America**, supra. In any event, before the principle of anticipatory breach is applicable at all, there must have been an absolute and unambiguous repudiation of the entire contract **while executory** on both sides. **Mobley v. New York Life Ins. Co.**, 55 S. Ct. 876, 295 U. S. 632, 79 L. Ed. 1621.

In **New York Life Insurance Company v. Viglas**, 56 S. Ct. 615, 297 U. S. 672, 80 L. Ed. 971, this court, citing **Allen v. National Life & Accident Ins. Co.**, supra, and a number of other cases, stated there is an "impressive concord of opinion that there can be no recovery for commuted benefits based upon life expectancy under a disability income policy."

The law of Missouri is clear and firmly established and in accord with the decisions of this court.

(3) The District Court and the Court of Appeals properly applied the summary judgment rule, Rule 56 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., since respondent was entitled to judgment as a matter of law. **Allen v. National Life & Accident Ins. Co.**, supra; **Buis v. Prudential Ins. Co. of America**, supra, and the multitude of cases cited under points 1 and 2 for argument.

Furthermore, the questions presented in the petition for writ of certiorari were not raised in the Court of Appeals or in the trial court, and, consequently, are not before this court for review. Up until this time, petitioner has urged adoption of an exception to the general rule that there can be no recovery for commuted benefits based upon life expectancy under a disability income policy. Now, for the first time, petitioner urges that summary judgment should not have been granted since she may be able to present fact questions for a jury to

consider. In the trial court, petitioner did not, by affidavit or otherwise, set up the facts which she contends should be passed upon by a jury, as required by Rule 56 (e) of the Federal Rules of Civil Procedure, 28 U. S. C. A., and no such facts are before the court.

It is clear that points for review not raised below are not open on a petition for writ of certiorari. **Ellis v. Dixon,** 75 S. Ct. 850, 349 U. S. 458, 99 L. Ed. 1231, Rehearing denied 76 S. Ct. 37, 350 U. S. 855, 100 L. Ed. 759; **Blair v. Oesterlein,** 48 S. Ct. 87, 275 U. S. 220, 72 L. Ed. 249.

CONCLUSION.

Petitioner failed to show that the Court of Appeals, in its opinion in this case, decided a question of substance not heretofore determined by this court or in a way probably not in accord with applicable decisions of this court.

Respondent therefore submits that the petition should be denied.

Respectfully submitted,

JOHN S. MARSALEK,
330 Pierce Building,
112 North Fourth Street,
St. Louis, Missouri 63102,
Attorney for Respondent.

Of Counsel:
MOSER, MARSALEK, CARPENTER,
CLEARY & JAECKEL.